BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEITH BROWNING Claimant	)	
VS.	)	
EASY CREDIT AUTO SALES, INC. Respondent	)	Docket No. 1,028,772
AND	)	
FIRSTCOMP INSURANCE COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 1, 2010, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on May 4, 2010. R. Todd King, of Wichita, Kansas, appeared for claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident on April 14, 2006, that arose out of and in the course of his employment. The ALJ also concluded that claimant was entitled to a work disability. By averaging the two task loss opinions of Dr. Paul Stein, the ALJ determined that claimant had a 64.5 percent task loss. The ALJ also adopted the testimony of Jerry Hardin and found that claimant had a 58 percent wage loss.[1] The ALJ, therefore, calculated claimant's work disability to be 61 percent.[2]

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[1] The ALJ determined claimant's preinjury gross average weekly wage was $494. Although the ALJ did not make a specific finding of claimant's actual earnings post accident, the record suggests Mr. Hardin used a post-injury weekly wage of $250. (Claimant was working 30 to 40 hours per week as a liquor store clerk earning $6.55 per hour.) This results in a wage loss of 49 percent, not 58 percent. The reason for this difference is that Mr. Hardin used an incorrect preinjury average weekly wage of $594.

[2] Averaging a 49 percent wage loss with a 64.5 percent task loss results in a work disability of 56.75 percent rather than the 61 percent awarded by the ALJ. In addition, the ALJ awarded temporary total disability and permanent partial disability compensation at the rate of $396.02 per week. Based on an average weekly wage of $494, however, the compensation rate would have been $329.35.

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties stipulated that claimant's gross preinjury average weekly wage was $570. This stipulation covers the period before and after the date when fringe benefits were terminated.

ISSUES

Respondent asserts that claimant did not suffer personal injury by accident that arose out of and in the course of his employment. In the event the Board finds that claimant suffered a compensable injury, respondent argues that claimant is not entitled to a work disability because he has no work restrictions. Therefore, respondent contends that claimant's permanent partial disability award should be limited to his 10 percent functional impairment.

Claimant asks the Board to affirm the Award of the ALJ in its entirety.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident that arose out of and in the course of his employment?

(2) If so, what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent as a mechanic for over four years. His job included lifting, bending, and twisting. On Friday, April 14, 2006, claimant said he was working on an engine that had been mounted on an engine stand. Claimant said he was crouched down removing a bracket from the engine, and when he broke a bolt loose, the engine twisted on the engine stand. When he looked up, he saw the engine coming toward his head, so out of instinct he jumped up and grabbed the exhaust manifold. At that point, claimant felt as if someone had kicked him in the back. This occurred between 3 and 4 p.m. Claimant continued to work until 5 p.m. No one was in his work area at the time, and no one came into the area after his injury.

According to claimant, he did not work on that engine the rest of that day, and for the next hour or so, he disconnected fuel lines and wiring harnesses on another engine. When he left to go home, the pain in his back was a dull ache. When claimant got home, he got in his hot tub, but it did not offer him much relief.

Claimant's back was pretty sore when he first got up on Saturday. It was worse than it had been on Friday night, but it got better as he moved around. Earlier in the week in which claimant was injured, he had asked Mike Tjaden, his supervisor, and a coworker if they would help him move a filter for his above-ground pool on Saturday because it was

too heavy for one person to move. The coworker did not come, but Mr. Tjaden and his brother did. Mr. Tjaden brought a dolly with him, and he and his brother lifted the filter onto the dolly. After they placed the filter on the dolly, they moved it to a deck in the pool area. Claimant did not do any of the lifting. He said after the filter was moved to the pool area and set in place, he turned it to line up with the pump, but that did not require him to exert himself. Claimant did not say anything to Mr. Tjaden on Saturday about having a problem with his back or having an accident at work. Mr. Tjaden's testimony concerning the events of Saturday at claimant's home was consistent with that of claimant.

When claimant woke up on Sunday morning, his back was sore–about like it had been on Saturday morning. However, his back stayed sore on Sunday. On Monday, April 17, claimant tried to come back to work. Mr. Tjaden testified he saw claimant get out of his vehicle and limp to the front door. Mr. Tjaden asked claimant what was wrong with his back, but claimant did not give him an answer, other than to say he would not be any good for him that day and that he needed to see a doctor. Claimant did not report having sustained a work injury the previous Friday. He clocked out about an hour later and went home.

When claimant woke up on Tuesday, April 18, the pain in his back was causing his muscles to spasm.[3] Claimant said he could not stand up. He had pain radiating down his left leg to his mid thigh. Claimant said he got in the shower, but his back hurt worse after the shower. He stepped out of the shower, bent over to get his towel off the floor, and had an immediate onset of pain. He said he did not fall, but he got down on his hands and knees. He crawled to his bed but could not get into bed without help from his wife.

Because claimant could not walk, he decided to go to the Wichita Clinic. Claimant testified that on the way, he realized he had injured his back at work because the pain he was having on Tuesday was the exact pain he had felt on Friday. Therefore, when he got to Wichita Clinic, he told them he had hurt himself at work. He was then told by the Wichita Clinic personnel that he had to be seen at the occupational medicine clinic. When claimant got to occupational medicine, he was told he could not be treated because he did not have authorization from his employer. Claimant said he called Mr. Tjaden and asked for authorization to see a doctor because he had hurt his back working on an engine. Mr. Tjaden told him he could not authorize treatment under workers compensation and told claimant to call Mary Hudson, who worked in the front office. Someone from the occupational medicine clinic called Ms. Hudson. Ms. Hudson said that was the first she heard of an accident and would get back with them. The personnel at the occupational medicine clinic told claimant he would have to wait until Ms. Hudson called back. Claimant

[3] Although claimant originally testified this occurred on Monday, April 17, at the preliminary hearing of October 5, 2006, pp. 16-17, and in his deposition testimony of October 6, 2006, pp. 51-54, claimant testified at the regular hearing that he had the date wrong in his earlier testimony and that the events he originally said had occurred on April 17 actually occurred on Tuesday, April 18.

said he waited three to four hours and no one from respondent called. At that point, claimant asked his wife to take him to the emergency room.

Claimant said he told the emergency room personnel that he had hurt himself at work the previous Friday. To the best of his knowledge, the personnel at the emergency room did not contact respondent that day. Claimant gave them his personal health insurance information, and he was treated. He was given two shots to get his muscles to relax. He was still unable to walk because the muscle relaxant was so strong. He got home between 4 and 5 p.m. and called Mr. Tjaden on his cell phone, saying he would be off work a couple of days and that it was related to something that happened to him on the job. Claimant agrees that Tuesday, April 18, was respondent's first notice of his work-related accident of April 14, 2006.

Mr. Tjaden testified that on Tuesday, April 18, he got a call from a medical office stating it wanted authorization under workers compensation to treat claimant's back. Mr. Tjaden said he was surprised because he had not heard that an accident had occurred at work. Mr. Tjaden said he talked to claimant after he talked to the representative of the medical office, and claimant told him that he had been hurt the previous Friday. Mr. Tjaden said he told claimant he could not give approval for workers compensation and that claimant needed to speak with Rick Hill, respondent's general manager.

Mr. Tjaden refutes claimant's claim that he was injured at work on Friday, April 14, 2006. He said on April 14, claimant and another technician lifted the engine onto the two-post, and claimant was the one who slid it onto the stand. He said that claimant was supposed to be working on the engine that day, but nothing had been done on the project by Monday, April 17. Mr. Tjaden said he did not know anything about a bracket. He said that claimant did not do any of the job and that he had torn the engine down himself and put it all back together on Monday, April 17.

Claimant was off work about a week and then returned and worked until August 2006, when he was taken off work by his authorized treating physician, Dr. Paul Stein.

Respondent contends that claimant was not injured in the scope of his employment. It contends that claimant was either injured during the weekend of April 15 and 16, or claimant's complaints were the result of a preexisting condition. Claimant admits that he had been seen by a chiropractor, Dr. Rodney Hollinger, as recently as two days prior to his alleged work-related accident of April 14, 2006. On April 12, 2006, he complained to Dr. Hollinger that he woke up with back pain. Claimant also testified that during the course of his treatment with Dr. Hollinger, he at times complained of some left hip and leg discomfort. Claimant, however, testified that although he previously had some occasional low back pain, the pain was unlike the pain he now has.

Dr. Hollinger testified he first saw claimant on August 2, 2005, and claimant was complaining of left lower back pain into his left leg and numbness in his feet. Claimant said

he had been moving furniture at home on August 1, 2005. Claimant returned to Dr. Hollinger on August 5 and 24. Claimant was seen again on October 24, 2005, at which time claimant told Dr. Hollinger he woke up that morning with low back pain and either thoracic radiating pain or lumbar radiating pain. Claimant saw Dr. Hollinger again on October 26, 2005. Claimant next came in on December 6, 2005, complaining that he woke up with pain radiating from his neck into either the arm or shoulder. He also complained of thoracic radiation. Dr. Hollinger saw him one other time for that complaint in December 2005.

Claimant went back to see Dr. Hollinger on January 18, 2006, complaining that he woke up with low back pain. His next appointment was on March 6, 2006. Claimant said he had been tiling at home on March 2, 2006. Dr. Hollinger said claimant's lumbar spine was involved in that visit. Claimant was seen four times from March 6 to March 20, 2006. Claimant's last visit was on April 12, 2006. Claimant told Dr. Hollinger he woke up that morning with low back pain and with either thoracic or lumbar radiating type of pain. From looking at his records, Dr. Hollinger was not able to tell whether the radiation extended to the upper or lower extremities or to any other part of the body. For each of claimant's treatment, from August 2005 to April 2006, claimant received a full spine manipulation with electrical stimulation and intersegmental traction. Dr. Hollinger has not treated claimant since April 12, 2006.

Dr. Hollinger said he would not define claimant's back problems as chronic. He pretty much saw claimant only incidental to specific events. When he last saw claimant, he was not under the impression that claimant was in an immediate need for surgery. There is nothing in his records that indicates that Dr. Hollinger believed claimant was incapable of employment or needed work restrictions.

Dr. Paul Stein, a board certified neurosurgeon, initially evaluated and then treated claimant. He first saw claimant on June 7, 2006, at which time claimant was complaining of low back pain going into both buttocks and down the back of his left lower extremity. Claimant said he had some numbness and tingling in his left foot, and also said he had a tendency at times to trip on his left foot when walking. Claimant was walking with a limp, and he had a sensory deficit in his left foot. Claimant said he had been injured on April 14, 2006, when he reached to grab an engine that was on a stand and felt an acute pain in his back radiating into the left leg. Claimant told Dr. Stein that he had no prior history of low back or left lower extremity symptomatology other than some occasional muscle strains. Dr. Stein provided claimant with conservative treatment by way of epidural steroid injections and physical therapy. Claimant did not respond to those treatments, and additional testing was done. After the testing, Dr. Stein referred claimant to Dr. Moskowitz for surgery.

The last time claimant was seen by Dr. Stein was on August 12, 2008. At that time claimant did not appear to have a limp, and he did not have any tenderness or spasm in his low back. He had an absent left ankle reflex. He had good strength and his sensory

examination was normal. In summary, Dr. Stein's findings were some restriction of the low back and a persistent absent left ankle reflex.

Based on the AMA *Guides*,[4] Dr. Stein rated claimant as being in diagnosis related estimate (DRE) Lumbosacral Category III, for a 10 percent whole person impairment. At the time Dr. Stein saw claimant, he was not taking any pain medication, but Dr. Stein said he might require some from time to time.

Dr. Stein believed permanent work restrictions were appropriate for claimant. He recommended that claimant avoid lifting more than 50 pounds with any single lift up to twice a day, 35 pounds occasionally, and 25 pounds more often. He also recommended that claimant avoid frequent lifting from below knuckle height; avoid frequent and repetitive bending or twisting of the low back; and have the opportunity to alternate sitting, standing and walking at least on an hourly basis, if needed. In Dr. Stein's opinion, claimant's surgery, impairment, and need for permanent restrictions were the result of his April 14, 2006, work related injury.

Dr. Stein, in reviewing Dr. Hollinger's records, said that the low back and hip pain claimant described therein was more than he would have anticipated, since claimant told him that he only had occasional muscle strains in the back consistent with his employment. Claimant did not volunteer that he had seen Dr. Hollinger two days before his work accident. Dr. Stein said that if all of claimant's visits to Dr. Hollinger were related to his low back, he would assume that claimant had at least some level of chronic lower back discomfort and claimant may have had a preexisting 5 percent impairment. However, Dr. Stein did not change his opinion that claimant's surgery was due to the April 14 accident at work.

Dr. Alan Moskowitz, a board certified orthopedic specialist, examined and treated claimant. He first saw claimant on November 30, 2006. He treated claimant for several months and ultimately performed a total disk arthroplasty at L4-5 on May 30, 2007. After the surgery, Dr. Moskowitz followed up with claimant, and sent him to physical therapy. On July 16, 2007, claimant told Dr. Moskowitz that he was having some issues at home and that he was depressed. He said he woke up at night screaming and asked for a referral for an evaluation of his psychological problems. Claimant was referred to Dr. James Wright.

On May 15, 2008, approximately a year after claimant's surgery, Dr. Moskowitz released him from care. At that time, claimant was doing well, and he was released to return to work without restrictions. Dr. Moskowitz believed claimant would be able to return to work as a mechanic. Claimant returned to see Dr. Moskowitz in May 2009. At that time,

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Moskowitz' notes indicate that claimant was continuing his activities without much restriction. At his deposition, Dr. Moskowitz also said that he would defer to other physicians or an FCE as to restrictions or what job tasks claimant could or could not perform.

Dr. James Wright is a psychologist who treated claimant. He first saw claimant on August 15, 2007. He saw him again on August 22 and September 17, 2007, and has not seen him since. His September 17 notes indicate that claimant would return in two weeks. However, claimant did not reschedule another appointment. Dr. Wright had no contact with anyone regarding why claimant was not returning, other than claimant was continuing with Dr. Ram, the psychiatrist who was furnishing him with antidepressants. Claimant reported to Dr. Wright on September 17 that the medication he had been taking had been helping him. Claimant saw Dr. Ram in October 2007 and had an up-coming appointment with Dr. Ram for a medication check on April 21, 2008. Dr. Wright has not contacted claimant to find out if he needs to come back for more therapy.

In a letter to claimant's attorney dated September 16, 2007, Dr. Wright opined that in light of all relevant clinical data, claimant's depression was due to complications of his work-related injury and subsequent chronic pain and inability to work. Dr. Wright did not administer any type of testing to claimant. Claimant gave Dr. Wright a history of insomnia due to pain. He said he was forgetful. He woke up screaming and did not know he was screaming. He had low self-esteem and pain issues.

Dr. Wright admitted that as of the date of his deposition, he did not know whether claimant's psychological condition was ongoing or whether his condition was permanent or temporary in nature. In regard to the nightmares, Dr. Wright was concerned that claimant might be having nightmares associated with his injury, which would not be uncommon if someone had a posttraumatic stress reaction to a trauma. He did not, however, diagnose claimant with posttraumatic stress disorder; claimant was diagnosed with major depression. Dr. Wright believed claimant's depressive disorder was situational in nature. He said it was not uncommon for people with depression to feel better and just not come back to therapy.

After claimant was released by Dr. Moskowitz, he brought his release form to respondent. Soon after, he received a letter saying that his services were no longer necessary, and he was formally terminated. Claimant began looking for work and on July 13, 2008, began working from 30 to 40 hours a week as a retail clerk at a liquor store making $6.55 per hour.

Jerry Hardin, a personnel and human resource consultant, met with claimant on November 12, 2008, at the request of claimant's attorney. He compiled a list of 72 tasks that claimant performed in the 15-year period before his accident of April 16, 2006. Claimant told Mr. Hardin that he had four jobs in that period. Claimant later testified that in listing his jobs in the last 15 years for Mr. Hardin, he forgot a three to eight month job

with Star Masonry in which he drove a forklift. He also worked at a gentlemen's club called The Outer Limits in 1993 or 1994, where he worked in management. Claimant testified there are no jobs within Mr. Hardin's report that would be substantially similar to the jobs he performed at Star Masonry and The Outer Limits. Mr. Hardin said claimant operated a forklift in his job for Ott Brothers Machine and that task was already on his task list. Mr. Hardin would not know what other activities claimant may have performed as a forklift operator. As far as claimant's job at the gentlemen's club, Mr. Hardin said claimant might have supervision tasks such as he performed when he ran his own company, but Mr. Hardin did not know of any other job tasks from the job at The Outer Limits that would be on his task list.

As best as Mr. Hardin could compute, claimant had a preinjury average weekly wage of $594.[5] He said claimant is currently a clerk in a liquor store earning approximately $250 per week. He therefore computed claimant's wage loss to be 58 percent.

Terry Cordray, a vocational rehabilitation counselor, met with claimant on February 2, 2009, at the request of respondent. They compiled a list of 42 tasks claimant performed in the 15 years before his April 2006 injury. Mr. Cordray's list included tasks claimant performed at both Star Masonry and The Outer Limits.

Dr. Stein reviewed the task list prepared by Jerry Hardin. Of the 72 nonduplicated tasks on Mr. Hardin's list, Dr. Stein opined that claimant was unable to perform 57 for a 79 percent task loss. Dr. Stein also reviewed the task list prepared by Terry Cordray. Of the 42 tasks on that list, Dr. Stein said claimant was unable to perform 21 for a 50 percent task loss. Dr. Moskowitz refused to review a task list and gave no task loss opinion.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

[5] Claimant testified he worked a 40-hour week earning $12.50 per hour. He also said he worked three to five hours per week overtime at time and a half. Further, he said that respondent paid $180 per month toward his health insurance, which would compute to $41.54 per week. Using an average of four hours overtime per week, claimant's preinjury average weekly wage would be $616.54. Without any explanation or analysis, the ALJ determined claimant's preinjury gross weekly wage was $494. Neither party appealed the issue of claimant's preinjury average weekly wage, but during argument to the Board the parties stipulated to an average weekly wage of $570.

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[11]

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[6] K.S.A. 2009 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

ANALYSIS

Claimant alleges he injured his low back at work on Friday, April 14, 2006, while working on an engine. Claimant described his injury as feeling as if someone had kicked him in the back. Despite this significant event, claimant did not mention this accident or his injury to anyone at work that day. The next day, Saturday, claimant's supervisor, Mike Tjaden, was at claimant's home to help claimant move a filter for his pool. Claimant did not say anything to Mr. Tjaden on Saturday about having injured his back at work the day before. Claimant said his back remained symptomatic that Saturday and Sunday. On Monday, when claimant went to work, he was limping. Mr. Tjaden asked claimant what was wrong. Claimant replied that he would not be any good that day and that he needed to see a doctor. Claimant did not tell Mr. Tjaden that he had a work-related back injury or that he had sustained an injury at work the previous Friday. Instead, claimant clocked out after about an hour. However, he did not go to a doctor that day. The next day, Tuesday, April 18, claimant was worse, and he did go to a doctor. That was also the day that claimant first reported a work-related accident and injury.

Mr. Tjaden disputes claimant's version of how his alleged injury occurred. He said claimant did not work on the engine on Friday, April 14. In fact, Mr. Tjaden had to do that engine work himself the following Monday, April 17.

Finally, there is the fact that claimant sought treatment for his back with Dr. Hollinger on April 12, 2006. This was just two days before claimant's alleged accident at work on April 14, 2006. Taken together, these facts convince the Board that claimant did not suffer personal injury by accident at work on April 14, 2006, as alleged.

CONCLUSION

Claimant failed to prove he suffered personal injury by accident that arose out of and in the course of his employment with respondent on April 14, 2006.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 1, 2010, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge